Office-Supreme Court, U.S.
FILED
FEB 27 1981
ALEXANDER L. STEVAS,
CLERK

80-1482

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CAREY EUGENE SIMPSON, PETITIONER,

versus

STATE OF SOUTH CAROLINA

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

H. W. C. FURMAN
One Lafayette Court
Camden, S.C. 29020
Counsel of Record.

GEORGE W. SPEEDY
One Lafayette Court
Camden, S.C. 29020
Counsel for Petitioner.

QUESTIONS PRESENTED

1. Whether the proper standard of proof was used by the Supreme Court of South Carolina and by the state trial court in determining if the essential elements of the crime charged against Petitioner were present, the courts in question using the "any evidence" standard, and whether the due process rights quaranteed to Petitioner under the Fourteenth Amendment of the United States Constitution were violated in that there was insufficient evidence to justify a rational trier of facts finding Petitioner guilty beyond a reasonable doubt of the essential elements of the crime with which he was charged, viz., possession of marijuana with the intent to distribute.

2. Whether the Supreme Court of the State of South Carolina erred in not reversing the trial judge's admitting in evidence certain items obtained by law enforcement authorities pursuant to a warrantless search of Petitioner's motel room, all in violation of Petitioner's rights under the Fourth Amendment of the United States Constitution.

3. Whether the Supreme Court of the State of South Carolina erred in not reversing the trial judge's admitting in evidence the marijuana residue seized from Petitioner's airplane in that the search and seizure conducted by law enforcement authorities was violative of Petitioner's rights under the Fourth Amendment of the United States Constitution, since before obtaining a warrant to search the airplane, State agents had looked into the airplane's windows.

TABLE OF CONTENTS

Opinion Below 1

Jurisdiction 1

Statement of Case 2

Reasons For Granting the Writ:

1. The Decision Below Conflicts with the Decision of the Supreme Court of the United States as to the Standard of Review to Use When Determining Whether Sufficient Evidence Exists to Convict an Individual of a Crime, and Decision Below Violates Petitioner's Due Process Rights Because The Evidence Adduced Against Him Was Insufficient to Justify a Finding of Guilt Beyond a Reasonable Doubt 4
2. The Decision Below Conflicts with the Decisions of the Supreme Court of the United States as to Search and Seizure of Evidence 6

Conclusion 7

Appendix (Opinion and Judgment of Supreme Court of the State of South Carolina, and Decision of the Supreme Court of South Carolina as to Petitioner's Petition for Rehearing) 9,15

TABLE OF AUTHORITIES

Cases: PAGE

Chimel v. California, 395 U.S. 752 (1969) 7

Coolidge v. New Hampshire, 403 U.S. 510 (1971) 6

Jackson v. Virginia, 443 U.S. 507 (1979) 4,5

Silverthorne Lumber Company v. United States
251 U.S. 385 (1920) 6

Thompson v. Louisville, 362 U.S. 199 (1960) 4

Winship, In re, 397 U.S. 358 (1970) 4

No. _____

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1980

CAREY EUGENE SIMPSON, PETITIONER,

versus

STATE OF SOUTH CAROLINA

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Carey Eugene Simpson, the Petitioner herein, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of South Carolina entered in the above-entitled case on November 10, 1980.

OPINION BELOW

The opinion of the Supreme Court of South Carolina, is reported at State vs. Carey Eugene Simpson, _____ S.C. _____, 272 S.E. 2d 431 (1980), and is printed in the Appendix hereto.

JURISDICTION

The judgment of the Supreme Court of the State of South Carolina was entered on November 10, 1980. A timely petition for rehearing was denied on December 3, 1980 (Appendix). The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C., 1257 (3).

STATEMENT OF CASE

On the afternoon of March 17, 1979, Petitioner landed a twin-engine Cessna 421 airplane at the Camden Airport, located in the City of Camden, County of Kershaw, State of South Carolina. Petitioner desired to park the airplane overnight and to have repairs done to the aircraft, if such were needed. After making the necessary arrangements with the airport's manager, Petitioner left the airport and obtained a room at the Holiday Inn in Lugoff, South Carolina, a town adjoining the City of Camden.

Shortly after Petitioner's landing and parking his airplane, agents from South Carolina's Law Enforcement Division arrived and looked into the windows of the aircraft. Some testimony indicates that a stepladder may have been used. A search warrant was then obtained and the airplane was searched. Approximately 3.47 grams of marijuana residue were gathered by agents from the floor of the aircraft. No other contraband was found. Sometime that evening law enforcement officers proceeded to Petitioner's motel room, with an arrest warrant but without a search warrant, and arrested Petitioner. A flight bag was seized and taken from the room. Inside the bag were various flight paraphanelia such as aeronautical maps, a United States passport in Petitioner's name, a flight notebook, and a pilot's license and credit cards, in the Petition's name.

Petitioner was tried in state court on May 9 and May 10 of 1979, for possession of marijuana with the intent to distribute it, under Section 44-53-370 of the S.C. Code of Laws Ann. (1976). The Trial ended in a mistrial when the jury could not agree on a verdict. Petitioner was again tried on the same charge on May 17 and 18, 1979. During the trial the State introduced in evidence, over Petitioner's objection that the evidence was the fruit of an illegal search and seizure, testimony concerning marijuana residue allegedy found in the aircraft. (*See* Trial Transcript at pages 27-32). During the

trial the State also introduced in evidence, over Petitioner's objection that the evidence was the fruit of an illegal search and seizure, the contents of Petitioner's flight bag which was seized in his motel room. (*See* Trial Transcript at pages 59-78).

At the close of the State's case Petitioner moved for a directed verdict on the ground that the prosecution had failed to establish by sufficent evidence proof that Petitioner was guilty of possession of marijuana with the intent to distribute it. (*See* Trial Transcript at pages 108-09). The motion was denied and the case went to the jury, which returned a guilty verdict. A motion was made by Petition for judgment notwithstanding the verdict on the ground that insufficient evidence existed to convict Petitioner of the crime charged. The motion was denied (*See* Trial Transcript at page 125).

Petitioner appealed his claim to the Supreme Court of the State of South Carolina on the grounds that there was insufficient evidence to sustain the conviction and that his Fourth Amendment rights were violated by the illegal search and seizure of items from his airplane and motel room and their use in evidence. The Supreme Court of South Carolina, with one dissenting opinion, affirmed the conviction on November 10, 1980, using the "any evidence" test to conclude that sufficient evidence existed to sustain the conviction. Petitioner's Fourth Amendment arguments were not acknowledged. The majority and dissenting opinion appear in the Appendix of this Petition. On December 3, 1980, the Supreme Court of South Carolina, with one dissenting opinion, denied Petitioner's timely Petition for Rehearing. The majority and dissenting opinions appear in the Appendix of this Petition.

REASONS FOR GRANTING WRIT

1.

The Decision Below Conflicts with the Decision of the Supreme Court of the United States as to the Standard of Review to Use When Determining Whether Sufficient Evidence Exists to Convict an Individual of a Crime, and the Decision Below Violates Petitioner's Due Process Rights Because Evidence Adduced against Him was Insufficient to Justify a Finding of Guilt Beyond a Reasonble Doubt.

In *Jackson vs. Virginia*, 443 U.S. 507 (1979), this Court held that in a challenge to a state criminal conviction brought under the federal habeas corpus statute, the applicant is entitled to habeas corpus relief "if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Id.* at 2792. The standard used in reviewing the evidence should no longer be the "no evidence" standard enunicated in *Thompson v. Louisville*, 362 U.S. 199 (1960), but should be the constitutional standard propounded in *In re Winship*, 397 U.S. 358 (1970). Due process requires that a defendant in a criminal case not be convicted "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Id.* at 364.

In the state court proceedings below the standard of evidentiary review used was an "any evidence" standard:

> (I)t is the (trial judge's) duty to submit the case to the jury if there is evidence, either direct or circumstantial, which reasonably tends to prove the guilt of the accused . . . . *See* Appendix, Opinion No. 21322.

Although a dissenting opinion recognized the *Jackson v. Virginia, supra,* standard of review, the majority opinion of the Supreme Court of South Carolina did not acknowledge it. The evidence adduced at trial to convict Petitioner falls short of the *Jackson v. Virginia, supra,* standard. Only 3.47 grams of marijuana residue was found in the Petitioner's airplane. No other drugs or drug paraphenalia were discovered, either in the airplane or in Petitioner's motel room, and there was no evidence that Petitioner had actually distributed any contraband in the State of South Carolina. Although Petitioner was arguably in possession of marijuana, no or insufficient evidence was produced as to his intent to distribute the marijuana. In fact, the prosecution's own witnesses testified that marijuana residue is not distributed or sold by those engaged in drug dealing. Intent to distribute, an element of the crime with which Petitioner was charged, was not sufficiently established such as to "justify a rational trier of facts to find guilt beyond a reasonable doubt."

Petitioner asks this Court to apply the *Jackson v. Virginia, supra,* due process standard of review to state court criminal cases brought before it via a petition for writ of certiorari immediately after exhaustion of state court remedies.

2.

The Decision Below Conflicts with the Decision of The Supreme Court of the United States as to Search and Seizure of Evidence.

The Supreme Court of South Carolina in its majority opinion did not acknowledge Petitioner's exceptions to the trial court's admitting in evidence certain testimony and evidence which were the result of searches and seizures made by law enforcement authorities.

Shortly after Petitioner's landing his aircraft, and after he had left the airport, state agents arived and looked into the aircraft. They then obtained a search warrant to search the aircraft based on what they had seen inside. A plain view search was not justified in this instance since the agents cannot have been said to stumble across the incriminating contraband inadvertently. *Coolidge v. New Hampshire*, 403 U.S. 510 (1971). If they had probable cause to believe the aircraft contained contraband, they should have secured a search warrant pursuant to the requirements of the Fourth Amendment. Any evidence or testimony resulting from that initial illegal search, should have been excluded. *Silverthorne Lumber Company v. United States*, 251 U.S. 385 (1920).

Likewise, the evidence seized in Petitioner's motel room should have been excluded. The authorities procured an arrest warrant to arrest Petitioner. They failed to procure a search warrant to search his room although there was sufficient time to obtain one. The State argued at trial that the search was legal because incident to a lawful arrest. However, at the time of the search, Petitioner was either in the hallway of the motel or in the doorway of his room, with arms held over his head. Numerous law enforcement officials surrounded him with drawn weapons. One officer went past Petitioner into his motel room in order to secure it. It was only after his arrest that the authorities seized Petitioner's flight

bag and rummaged through it. Petitioner was at that time in police custody. A search warrant should have been obtained if the authorities had probable cause to believe there was contraband in the bag. Since Petitioner was not in immediate control of the room when the search was made, the search and seizure were illegal and the items obtained therefrom should have been excluded from evidence. *Chimel v. California*, 395 U.S. 752 (1969).

CONCLUSION

Wherefore, Petitioner respectfully prays that a Writ of Certiorari be granted to review the judgment and opinion of the Supreme Court of South Carolina.

Respectfully submitted,

H.W.C. Furman
One Lafayette Court
Camden, S.C. 29020
Counsel of Record,

George W. Speedy
One Lafayette Court
Camden, S.C. 29020
Counsel for Petitioner.

APPENDIX

Opinion No. 21322

Filed November 10, 1980

AFFIRMED

George W. Speedy, of Furman & Speedy, of Camden, for Appellant

Attorney General Daniel R. McLeod, Assistant Attorneys General Kay G. Crowe and Lindy Pike Funkhouser, and Solicitor James C. Anders, all of Columbia, for respondent.

LITTLEJOHN, A.J.: Carey Eugene Simpson was found guilty of possession of marijuana with intent to distribute, and he appeals. We affirm.

On March 17, 1979, appellant landed a twin-engine Cessna 421 aircraft at the Camden airport in Kershaw County, left the plane in the hands of the airport manager and checked into a local motel to spend the night. SLED agents who had been monitoring the plane's activity[1] peered through an exposed window and observed marijuana residue on the floor and seats of the airplane.

A search warrant was obtained and a small quantity of substance[2] vacuumed from the interior of the craft. Appellant was subsequently arrested at the motel. A search incident to the arrest turned up no contraband, but aeronautical maps, a passport, notebook, credit cards and other items were recovered and later introduced at trial.

[1]The craft entered the continental United States that morning without clearing customs, appearing on and off the radar screen. The United States Air Force was able to obtain positive number identification of the plane.

[2]At trial the State introduced 3.47 grams of marijuana leaf and seeds.

The State's case consisted of direct evidence that appellant maintained dominion and control over the aircraft and thus constructive possession of the marijuana recovered, *State v. Brown*, 267 S.C. 311, 227 S.E. 2d 674 (1976); *See, also, State v. Halyard*, ... S.C. .... 264 S.E. 2d 841 (1980), and circumstantial evidence that the plane had been used in a drug-smuggling operation[3]. A law enforcement expert in the field of smuggling operations opined a large quantity of marijuana had been transported by and unloaded from the craft with only the telltale residue remaining.

Appellant moved for a directed verdict of acquittal on the ground no substantial evidence was presented he intended to distribute the small quantity recovered from the plane.

Conviction of possession with intent to distribute does not hinge upon the amount involved. The amount involved in this case merely meant that the State could not rely upon the statutory presumption. In as much as the defendant offered no evidence, the ruling of the trial judge and of this court must depend upon evidence submitted by the State. While the evidence is susceptible of more than one reasonable inference, we cannot say that it is insufficient to warrant a conviction.

[3]In addition to the marijuana found in the plane and the maps, etc., recovered, two of the seats were missing from the interior and there were grass stains and pit marks on the propellers.

It is elementary that in determining whether the lower court should have granted a motion for a directed verdict of acquittal, the evidence must be viewed in the light most favorable to the State. In *State v. Chandler*, 267 S.C. 138, 226 S.E. 2d 553 (1976), we said:

> "When a motion for a directed verdict is made, the trial judge is concerned with the existence or nonexistence of evidence, not with its weight, and although he should not refuse to grant the motion where the evidence merely raises a suspicion that accused is guilty, it is his duty to submit the case to the jury if there is evidence, either direct or circumstantial, which reasonably tends to prove the guilt of the accused or from which guilt may be fairly and logically deduced. *State v. Wheeler*, 259 S.C. 571, 193 S.E. 2d 515 (1972); *State v. Jordan*, 255 S.C. 86, 177 S.E. 2d 464 (1970)."

On this appeal the burden of showing that the lower court erred is upon the appellant. He has failed to carry the burden, and we hold that the facts made issues for determination by the jury and should not have been ended as a matter of law by the judge.

Accordingly, the conviction is sustained and the lower court is

AFFIRMED.

LEWIS, C.J., NESS and HARWELL, J.J., concur. GREGORY A.J., dissents.

GREGORY, A.J.: (Dissenting) I respectfully dissent.

The only issue is whether tnere exists any competent evidence, direct or circumstantial, which reasonably tends to establish appellant's intent to distribute marijuana in Kershaw Count. I find none whether our traditional "any evidence" standard of review is applied, see *State v. Halyard*, _____S.C._____, 264 S.E. 2d 841 (1980), or the recently enunciated federal standard of review is used, i.e., whether any rational trier of fact, when viewing the evidence in the light most favorable to the prosecution, could have found the essential elements of the crime present beyond a reasonable doubt. See *Jackson v. Virginia*, 443 U.S. 507, 99 S.Ct. 2781, 61 L Ed. 2d 560 (1979). Accordingly, I would reverse the trial judge for his failure to direct a verdict of acquittal.

It can be inferred from the circumstances appellant at one time had in his possession, aboard the aircraft, a large quantity of marijuana. And I have no quarrel with the further logical inference he intended to distribute the contraband. But when appellant off-loaded the marijuana his intent to distribute came to fruition and vanished with the contraband. Where that occurred we know not, but there is simply no evidence in this record it took place in Kershaw County. On the contrary, the evidence is conclusive that the contraband was disposed of *before* the plane landed at the Camden airport. The record is barren of evidence the aircraft touched down at any other spot in Kershaw County prior to landing at the Camden airport or that appellant was in possession in Kershaw County of more than the 3.47 grams of marijuana leaf and seeds introduced at trial.

Even assuming the circumstantial and opinion evidence of a smuggling operation was admissible against appellant, one cannot reasonably infer he intended to gather and distribute the less than one-seventh of an ounce of spilled

marijuana leaf and seeds from the carpet and seats of the aircraft after having dumped his cargo of smuggled marijuana elsewhere. The State's own witnesses testified such a small amount of residure would not be vacuumed for distribution by smuggling operatives.

We have consistently held a case must not be submitted to the jury where the evidence raises mere suspicion of guilt. See Cases collected in West's South Carolina Digest, *Criminal Law*, at Key Nos. 746 (1) and 753 (2).

> "When a motion for a directed verdict is made the trial judge is concerned with the existence or nonexistence of evidence, not with its weight. It is his duty to submit the case to the jury, if there is any evidence, either direct or circumstantial which reasonably tends to prove the guilt of the accused or from which guilt may be fairly and logically deduced. However, the motion for a directed verdict should be granted where evidence merely raises a suspicion of guilt, or is such as to permit the jury to merely conjecture or to speculate as to the accused's guilt." *State v. Brown*, 267 S.C. 311, 227 S.E. 2d 674, 677 (1976).

See also *State v. Smith*, _____S.C._____,266 S.E. 2d 422 (1980). In my view the conviction affirmed by the majority today was for the possession and distribution in Kershaw County of that speculative but unknown quantity of marijuana which was the subject of much surmise and conjecture by the State's experts[1]. The record is not only without any evidence the offense took place in Kershaw County but clearly establishes that it did not. The appellant may be guilty of the offense elsewhere, but not in Kershaw County. I would reverse appellant's conviction for possession of marijuana with intent to distribute in Kershaw County.

[1]The offense of possession of marijuana was not at issue at trial.

The Supreme Court of South Carolina

December 3, 1980

Re: The State v. Carey Eugene Simpson

Dear Mr. Speedy:

The Court has this day refused your Petition for Rehearing in the above case in the following order:

"Petition denied.

s/ J. Woodrow C.J.

s/ Bruce Littlejohn A.J.

s/ J.B. Ness A.J.

s/ David W. Harwell A.J."

"Petition Granted: The majority opinion affirmed without treating and disposing of those other issues raised on appeal and now urged in the petition for rehearing. They, in my view, both merit and require discussion as well. Had the case been reversed as proposed in my dissenting opinion it would have been unnecessary to reach them. I would grant the petition.

s/ George T. Gregory, Jr. A.J."

The remittitur is being sent down today.

Very truly yours,

CLERK

FHS/rl

cc: Ms. Kay G. Crowe
The Honorable Lindy Pike Funkhouser